In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 885

JOSEPH DANIEL HOLT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on September 16, 1968. A petition for rehearing was denied on November 20, 1968. The petition for a writ of certiorari, filed on December 20, 1968, is therefore out of time under Rule 22-2 of the Rules of this Court. In any event, the questions sought to be raised do not warrant further review.

After a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted of unlawful possession of counterfeit

money, in violation of 18 U.S.C. 472. On December 1, 1967, he was sentenced to imprisonment for a period of twelve years and a fine of $5,000 (Pet. App. A). The court of appeals affirmed (Pet. App. B).

At the request of Secret Service agents, Harry Tripp, an informant who had worked with the Secret Service in two other cases in which he had given reliable information (R. 254, 79, 168-169, 190-192), made a telephone call to petitioner in Oklahoma City. In this conversation, Tripp told petitioner that he needed fifteen cars, which he testified meant $15,000, in counterfeit bills (R. 237-240). On June 14, a Secret Service agent accompanied Tripp as he traveled by plane from Dallas to Oklahoma City. Prior to the flight, the agent searched Tripp to ascertain that he had no counterfeit money in his possession and taped a small radio transmitter on his person. (R. 226, 228, 234). Other agents, alerted by the information received from Tripp, observed Tripp arrive at the airport in Oklahoma City, meet and converse with petitioner, after which petitioner went to a telephone booth (R. 74-78, 135-136, 163, 193-197, 234, 264-268, 270-271). Tripp used his radio device to inform the agents that petitioner was now in a telephone booth and had the counterfeit money on him (R. 170-171, 188-189, 229). When petitioner emerged, one of the agents approached him, saw that he had a package protruding from his left pocket and placed him under arrest (R. 140-142, 158). The package was found to contain 150 counterfeit $100 Federal Reserve notes (R. 137, 144, 201).

Petitioner testified that, among other activities, he was a dealer in used cars. The purpose of his meeting with Tripp was to receive some money to buy cars for Tripp. He was not wearing a coat that day and, upon receiving the package containing the money, stuck it in his left shirt pocket. He did not know that the money inside the package was counterfeit (R. 210-217).

1. The court properly denied motions both before and during trial to suppress the counterfeit bills seized at the time of petitioner's arrest. At the time of the arrest the agents had probable cause to believe that a felony was being committed, based on the knowledge received from a reliable informant, which was corroborated by petitioner's appearance at the time and placed expected, with a package bulging from his pocket, and by the further positive assertion of the informant that the money was on petitioner. *Draper* v. *United States*, 358 U.S. 307; *McCray* v. *Illinois*, 386 U.S. 300. The collective knowledge of the agents could properly be considered in ascertaining the existence of probable cause to arrest. *United States* v. *Ventresca*, 380 U.S. 102, 110; *United States* v. *Pitt*, 382 F. 2d 322 (C.A. 4).

2. No Fourth Amendment rights are violated by permitting the testimony of a government agent or informant as to a non-privileged conversation with an accused. *Hoffa* v. *United States*, 385 U.S. 293, 300-303; *Lewis* v. *United States*, 385 U.S. 206. Corroboration of such conversations by electronic means is likewise proper. *Lopez* v. *United States*, 373 U.S. 427; cf. *Rathbun* v. *United States*, 355 U.S. 107. In

Katz v. *United States*, 389 U.S. 347, 351, the Court recognized that if a person knowingly exposes his criminal activities by a voluntary conversation with another party, even in his own home or office, the Fourth Amendment affords him no protection against revelation by that party of the conversation. It is only if the "uninvited ear" intrudes into the conversation that a search and seizure, within the meaning of the Fourth Amendment, is found. Thus *Katz* does not constitute a repudiation of the *Lopez-Rathbun* authority. *Walker* v. *United States*, 397 F. 2d 789 (C.A. 5), pending on petition for certiorari, No. 929 Misc., O.T. 1968; *Handsford* v. *United States*, 390 F. 2d 373 (C.A. 5), certiorari denied, 391 U.S. 915; cf. *Leighton* v. *United States*, 386 F. 2d 822 (C.A. 2), certiorari denied, 390 U.S. 1025.[1] Moreover, in the present case the introduction of the tape had little, if any, significance. The judge's comment after hearing the tape was that he could not understand a word and did not feel that it helped a bit (R. 263-264, 309).

3. Petitioner, testifying in his own behalf, admitted having the bills in his possession on the occasion in question but denied knowledge that they were counterfeit and said that he accepted them without examination from Tripp, who wanted him to buy some used cars (*supra*, p. 3). To rebut this testimony and to prove guilty knowledge and intent, a Secret Service agent testified that, on May 23, 1966, he had received

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[1] Only the Seventh Circuit has taken the view that *Katz* overruled *Lopez* in a situation where the informer did not testify. *United States* v. *White*, decided en banc January 7, 1969. Here, however, the informant did testify.

a yellow-lined sheet of paper, which was folded over two counterfeit twenty-dollar bills from the operator of an automotive shop in Houston, Texas (R. 282-283). Latent prints on the yellow sheet were found to correspond with petitioner's fingerprints (R. 294). Petitioner established that the bills and yellow sheet were an exhibit in a federal court case in Houston in which petitioner had been acquitted upon direction of the court (R. 301, 307). The court gave a contemporaneous instruction that these items were admitted only to show knowledge, intent, motive or design as to the offense here charged and that petitioner could not be convicted on evidence tending to show the commission of another offense (R. 308). A similar instruction was given in the charge, with the further caution that evidence of an alleged earlier act must be clear and conclusive (R. 342-343).

Petitioner attacks the admission of this evidence on the ground that he was acquitted in the Texas case. The rule which permits introduction of evidence relating to similar transactions to show knowledge and intent of an accused is not restricted to proof of transactions adequate to establish guilt of a prior offense. *Hernandez* v. *United States*, 370 F. 2d 171, 174 (C.A. 9); *Oddo* v. *United States*, 396 F. 2d 806 (C.A. 5), certiorari denied, October 14, 1968, No. 302 O.T. 1968. The theory upon which such evidence is admitted is that repetition of instances similar in nature to the acts charged tends to negative the element of accident or inadvertence, even when the evidence tending to connect an accused with such events is tenuous. 2 Wigmore, *Evidence* (3 Ed.), §§ 302, 303, 313. This

line of reasoning is especially apt to the offense here charged. Possession of counterfeit money on a single occasion may well be the result of chance, but when the occasion is repeated, the element of chance tends to disappear. See Wigmore, op. cit. § 317, p. 218, n. 4. Contrary to petitioner's contention, evidence relating to intent is especially appropriate on rebuttal after the defendant has testified and denied guilty knowledge and intent. *Carrullo* v. *United States*, 184 F. 2d 743 (C.A. 8). The scope of such evidence is subject to the sound discretion of the trial court. *Glasser* v. *United States*, 315 U.S. 60, 81; *Sutton* v. *United States*, 391 F. 2d 592 (C.A. 5); *Love* v. *United States*, 386 F. 2d 260 (C.A. 8), certiorari denied, 390 U.S. 985.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1969

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